A

CHUA KIAN VOON v. MENTERI DALAM NEGERI MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
ROHANA YUSUF FCJ
B MOHD ZAWAWI SALLEH FCJ
ABANG ISKANDAR FCJ
NALLINI PATHMANATHAN FCJ
[CRIMINAL APPEAL NO: 05(HC)-32-02-2019(B)]
4 DECEMBER 2019

C

PREVENTIVE DETENTION: *Habeas corpus – Writ of habeas corpus – Application for – Detention order – Validity – Whether there was non-compliance with procedural requirements – Whether detainee briefed of his rights to make representations to Advisory Board – Failure to fill in language/dialect column in* D *detention order – Whether fatal – Whether recorded statement ought to bear date and time – Whether there was delay in conducting inquiry – Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(3), 4(5), 5(2), 9(2) – Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, rr. 3(1), (6)*

The appellant was arrested under s. 3(1) of the Dangerous Drugs (Special E Preventive Measures) Act 1985 ('1985 Act'). The investigating officer, assisted by a corporal who acted as an interpreter, recorded a statement from the appellant. Upon being satisfied that there was sufficient evidence to show that the appellant was involved in drug trafficking activities, a copy of the complete report of the investigation was submitted to the Deputy Minister F of Home Affairs and the inquiry officer of the Ministry. The Deputy Commissioner authorised further detention of the appellant beyond 14 days in accordance with the requirements of s. 3(2)(c) of the 1985 Act. The inquiry officer received an investigation report under s. 3(3) of the 1985 Act containing written statements recorded from certain witnesses and the G appellant, and conducted a physical examination on the appellant under s. 5(2) of the 1985 Act. The inquiry officer then submitted a report to the Deputy Minister pursuant to s. 5(4) of the 1985 Act after having been satisfied that there were reasonable grounds to believe that the appellant had been or was associated with activities relating to or involving the trafficking H in dangerous drugs *ie* methamphetamine as defined under s. 2 of the Dangerous Drugs Act 1952. The Deputy Minister issued a detention order under s. 6(1) of the 1985 Act, directing the appellant to be detained for a period of two years at the Pusat Pemulihan Akhlak Simpang Renggam ('the Centre'). The original copy of the detention order, the grounds of the detention order and the statement of facts upon which the order was made

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and three copies of Form I as provided under r. 3(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('1987 Rules') were served on and was said to have been explained to the appellant through a Mandarin interpreter, Constable Tong Wilson ('Constable Tong'). The investigating officer, through Constable Tong, told the appellant of his rights to make representation, to be represented by a counsel of his choice and to call witnesses before the Advisory Board ('Board'). The Board, after considering the representation of the appellant, forwarded its recommendation to the Yang di-Pertuan Agong pursuant to s. 10(1) of the 1985 Act. His Majesty affirmed the detention order. Dissatisfied, the appellant filed an application for a writ of *habeas corpus*. The judge, being satisfied that the detention order issued against the appellant was lawfully made, dismissed the appellant's application. Hence, the appellant appealed. The issues that arose were (i) whether there was a failure on the part of the investigating officer to inform the appellant of the latter's right to make representation before the Board; (ii) whether there was a failure on the part of the respondents to inform the Secretary of the Board of the service of the detention order; (iii) whether the recorded statement bore no date; (iv) whether the respondents had the right to withhold the recorded statement from the appellant; (v) whether there was a delay in conducting inquiry; and (vi) whether the officer in charge of the Centre delayed in reminding the appellant of his rights to make representations against his detention to the Board.

Held (allowing appeal)
Per Mohd Zawawi Salleh FCJ delivering the judgment of the court:

(1) There was a failure on the part of Constable Tong to fill up the column in Form I, which was a non-compliance with the statutory requirement. The provisions of s. 9(1) of the 1985 Act and r. 3(i) of the 1987 Rules require strict compliance and the failure on the part of Constable Tong to fill up the said column was indeed fatal. When the form was left blank, it could only be inferred that the interpretation did not take place. It casted doubt as to whether the explanation did or did not take place. Consequently, there was non-compliance with the statutory requirements as provided under those provisions. (paras 32 & 33)

(2) It was incumbent upon the respondents to convey to the Secretary of the Board of the service of three copies of Form I to the appellant. The language of r. 3(6) of the 1987 Rules is lucidly expressed. The receipt of Form I by the appellant was not a pre-condition for the respondent to convey to the Board of the service of Form I to the appellant. Rule 3(6) of the 1987 Rules merely stipulated for a situation where an

A appellant refused to accept any document at the time when he is served with a detention order. It did not absolve the investigating officer from informing the Secretary of the Board of the service of the three copies of Form I to the appellant. The respondent had failed to comply with the requirements of s. 9(2) of the 1985 Act and r. 3(6) of the 1987 Rules. (paras 34, 36 & 37)

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(3) The phrase 'date and time' in s. 4(5) of the 1985 Act is preceded by the word 'shall' and the word 'date' is immediately followed by the word 'and'. Therefore, the words 'date and time' must be read conjunctively. No part of a legislative enactment is to be treated as insignificant or

C unnecessary, and there is a presumption of the purpose behind every sentence, clause or phrase and no word in a statute is to be treated as superfluous. Therefore, the statutory requirement under s. 4(5) of the 1985 Act to state the date and time was mandatory. Failure to comply with the said section by not stating the time would render the detention

D unlawful. (paras 48 & 49)

(4) Section 14 of the 1985 Act allows the inquiry officer the general right to withhold disclosure or production of any document including the appellant's recorded statement. The operative words of that section are found in the last two lines where the relevant persons need not disclose

E documents 'if they consider it against the national interest to disclose or produce.' However, no reason was proffered by the inquiry officer why she thought it would be against national interest to disclose or produce to the appellant his recorded statement. The appellant's personal liberty was at stake. The appellant was detained under the 1985 Act without

F trial where some of the important legal safeguards, such as the presumption of innocence until proven guilty according to law in a public trial and the burden on the prosecution to prove every element of an offence beyond reasonable doubt, were denied to the appellant. Therefore, it was incumbent upon the respondents to give reasons for the

G failure to produce to the appellant his recorded statement, which they failed to do. (paras 54-56)

(5) As the burden to prove the detention was lawful lay on the detaining authority, whether the report was completed with convenient speed or without inordinate delay remained a matter for the detaining authority

H *ie*, the respondents, to establish. The court could not simply accede to the inquiry officer's plea of heavy workload as basis for the delay to conduct inquiry against the appellant under s. 5(2) of the 1985 Act. Thus, the 21 day delay in the time taken for the inquiry officer to conduct her inquiry against the appellant was inordinate and not with

I 'convenient speed'. This rendered the detention unlawful. (paras 68-70)

(6) There was no inordinate delay on the part of the officer in charge in explaining the appellant's right to make representation against his detention order to the Board. His explanation was reasonable, given the timing in which the appellant was brought in to the Centre, which was on a Thursday. Fridays and Saturdays were the designated weekend public holidays in the State of Johor. Upon returning to work on Sunday, he acted as required by r. 3(3) of the 1987 Rules and explained to the appellant of his rights to make representation before the Board. The conduct of the officer in charge of the Centre was reasonable and practical. (para 78)

(7) Under the provision of the 1985 Act, non-compliance with any procedural requirements are the only safeguards available to a detenu since the court is not allowed to go beyond the subjective satisfaction of the Minister. Therefore, the procedure requirements must be strictly and faithfully complied with. The High Court Judge had erred in arriving at the decision that he did and it behoved this court to intervene. Thus, this court issued the writ of *habeas corpus* and the appellant ought to be released forthwith. (paras 80 & 83)

Bahasa Malaysia *Headnotes*

Perayu telah ditahan bawah s. 3(1) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 ('Akta 1985'). Pegawai siasatan, yang dibantu seorang korperal yang bertindak sebagai jurubahasa, merekodkan kenyataan perayu. Apabila berpuas hati terdapat keterangan mencukupi menunjukkan perayu terlibat dengan aktiviti-aktiviti pengedaran dadah, satu salinan laporan penuh siasatan diserahkan kepada Timbalan Menteri Dalam Negeri dan pegawai siasatan Jabatan. Timbalan Pengerusi membenarkan penahanan lanjut atas perayu melebihi 14 hari menurut keperluan-keperluan s. 3(2)(c) Akta 1985. Pegawai siasatan menerima laporan siasatan bawah s. 3(3) Akta 1985 yang mengandungi kenyataan-kenyataan bertulis yang direkodkan daripada beberapa saksi-saksi serta perayu, dan menjalankan pemeriksaan fizikal atas perayu bawah s. 5(2) Akta 1985. Pegawai siasatan kemudiannya menyerahkan laporan kepada Timbalan Menteri bawah s. 5(4) Akta 1985 selepas berpuas hati terdapat alasan-alasan munasabah bahawa perayu telah terlibat atau mempunyai kaitan dengan aktiviti-aktiviti berhubungan atau melibatkan pengedaran dadah-dadah berbahaya iaitu methamphetamine seperti ditakrifkan bawah s. 2 Akta Dadah Berbahaya 1952. Timbalan Menteri mengeluarkan perintah tahanan bawah s. 6(1) Akta 1985, mengarahkan perayu ditahan untuk tempoh dua tahun di Pusat Pemulihan Akhlak Simpang Renggam ('Pusat'). Salinan asal perintah

A tahanan, alasan-alasan perintah tahanan dan kenyataan fakta perintah itu dibuat dan tiga salinan Borang I seperti diperuntukkan bawah s. 3(1) Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Prosedur Lembaga Penasihat) 1987 ('Kaedah 1987') diserahkan dan dijelaskan kepada perayu melalui seorang jurubahasa Mandarin, Konstabel Tong Wilson ('Konstabel
B Tong'). Pegawai siasatan, melalui Konstabel Tong, memberitahu perayu berkenaan hak-haknya untuk membuat representasi, untuk diwakili oleh seorang peguam pilihannya dan untuk memanggil saksi-saksi di hadapan Lembaga Penasihat ('Lembaga'). Selepas mengambil kira representasi perayu, Lembaga mengemukakan cadangannya kepada Yang di-Pertuan
C Agong menurut s. 10(1) Akta 1985. Baginda mengesahkan perintah tahanan itu. Tidak berpuas hati, perayu memfailkan permohonan writ *habeas corpus.* Hakim, berpuas hati bahawa perintah tahanan yang dikeluarkan terhadap perayu dibuat mengikut undang-undang, menolak permohonan perayu. Oleh itu, perayu merayu. Isu-isu yang timbul adalah (i) sama ada terdapat kegagalan pihak pegawai penyiasat memaklumkan perayu berkenaan haknya
D membuat representasi di hadapan Lembaga; (ii) sama ada terdapat kegagalan pihak responden memaklumkan Setiausaha Lembaga tentang penyerahan perintah tahanan; (iii) sama ada kenyataan yang direkodkan tidak mempunyai tarikh; (iv) sama ada responden-responden mempunyai hak untuk tidak mengemukakan kenyataan yang direkodkan kepada perayu;
E (v) sama ada terdapat kelengahan masa dalam menjalankan siasatan; dan (vi) sama ada pegawai bertugas Pusat lewat dalam mengingatkan perayu berkenaan hak-haknya untuk membuat representasi terhadap tahanannya kepada Lembaga.

F **Diputuskan (membenarkan rayuan)**

Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Konstabel Tong gagal mengisikan lajur di Borang I, satu ketidakpatuhan dengan keperluan berkanun. Peruntukan s. 9(1) Akta 1985 dan k. 3(1) Kaedah 1987 mengkehendaki pematuhan ketat dan kegagalan Konstabel
G Tong mengisikan lajur tersebut adalah mencacatkan. Apabila borang itu dibiarkan kosong, boleh disimpulkan bahawa tafsiran bahasa tidak berlaku. Ini telah menimbulkan keraguan sama ada penjelasan telah berlaku. Dengan itu, terdapat ketidakpatuhan keperluan-keperluan berkanun seperti yang diperuntukkan.

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(2) Wajib bagi responden menyampaikan kepada Setiausaha Lembaga berkenaan penyerahan tiga salinan Borang I kepada perayu. Bahasa k. 3(6) Kaedah 1987 dinyatakan dengan jelas. Penerimaan Borang I oleh perayu bukan satu pra-syarat untuk responden menyampaikan pada
I Lembaga berkenaan penyerahan Borang I kepada perayu. Kaedah 3(6)

Kaedah 1987 hanya menetapkan satu situasi jika perayu enggan menerima apa-apa dokumen pada masa dia diserahkan perintah tahanan. Pegawai penyiasat tidak dibebaskan daripada memaklumkan pada Setiausaha Lembaga berkenaan penyerahan tiga salinan Borang I kepada perayu. Responden gagal mematuhi keperluan-keperluan s. 9(2) Akta 1985 dan k. 3(6) Kaedah 1987.

(3) Frasa 'date and time' dalam s. 4(5) Akta 1985 didahului perkataan 'shall' dan perkataan 'date' diikuti seterusnya oleh perkataan 'and'. Oleh itu, perkataan-perkataan 'date and time' harus dibaca secara berkaitan. Tiada bahagian dalam enakmen perundangan yang harus dianggap sebagai tidak penting atau tidak perlu, dan terdapat anggapan tujuan sebalik setiap ayat, klausa atau frasa dan tiada perkataan dalam statut dianggap sebagai berlebihan. Oleh itu, keperluan statutori bawah s. 4(5) Akta 1985 untuk menyatakan tarikh dan masa adalah wajib. Kegagalan mematuhi seksyen tersebut dengan tidak menyatakan masa akan mengakibatkan penahanan salah dari segi undang-undang.

(4) Seksyen 14 Akta 1985 memberi pegawai siasatan hak am untuk menahan pendedahan atau pengeluaran apa-apa dokumen termasuk kenyataan termaktub perayu. Perkataan berkuat kuasa seksyen itu didapati dalam ayat terakhir di mana orang-orang relevan tidak perlu mendedahkan dokumen-dokumen 'if they consider it against the national interest to disclose or produce.' Walau bagaimanapun, tiada alasan diberi oleh pegawai siasatan mengapa dia berfikir mendedahkan atau mengemukakan kepada perayu kenyataan termaktubnya akan menentang kepentingan negara. Kebebasan peribadi perayu dipertaruhkan. Perayu ditahan bawah Akta 1985 tanpa perbicaraan dan beberapa perlindungan undang-undang penting seperti anggapan tidak bersalah sehingga dibuktikan bersalah menurut undang-undang dalam perbicaraan awam dan beban pendakwaan membuktikan setiap elemen kesalahan melampaui keraguan munasabah, telah dinafikan kepada perayu. Oleh itu, penting untuk responden-responden memberikan alasan untuk kegagalan mengemukakan kepada perayu kenyataan yang direkodkan tetapi mereka gagal berbuat demikian.

(5) Oleh kerana beban membuktikan penahanan adalah, menurut undang-undang, terletak pada pihak berkuasa, sama ada laporan diselesaikan dengan cepat atau tanpa kelengahan kekal satu perkara untuk pihak berkuasa iaitu responden-responden membuktikannya. Mahkamah tidak boleh hanya bersetuju dengan pli pegawai siasatan bahawa dia mempunyai kerja yang berat dan bertimbun sebagai dasar kelengahan menjalankan siasatan terhadap perayu bawah s. 5(2) Akta 1985. Oleh itu, kelengahan 21 hari oleh pegawai siasatan untuk menjalankan

A siasatannya terhadap perayu adalah keterlaluan dan bukan dengan kelajuan yang sepatutnya. Ini mengakibatkan penahanan tidak mengikut undang-undang.

(6) Tiada kelengahan keterlaluan oleh pegawai bertugas dalam menjelaskan hak perayu untuk membuat representasi terhadap perintah penahanannya
B kepada Lembaga. Penjelasannya munasabah, mengambil kira waktu perayu dibawa ke Pusat pada hari Khamis. Hari Jumaat dan Sabtu adalah hari cuti awam di Negeri Johor. Apabila kembali bertugas pada hari Ahad, pegawai bertugas telah bertindak seperti yang diperlukan oleh k. 3(3) Kaedah 1987 dan menjelaskan kepada perayu hak-haknya
C untuk membuat representasi di hadapan Lembaga. Tindakan pegawai bertugas Pusat itu munasabah dan praktikal.

(7) Bawah peruntukan Akta 1985, ketidakpatuhan apa-apa keperluan prosedur adalah satu-satunya pelindung untuk orang tahanan kerana mahkamah tidak dibenarkan melampaui kepuasan subjektif Menteri.
D Oleh itu, keperluan-keperluan prosedur harus dipatuhi dengan tegas dan benar-benar. Hakim Mahkamah Tinggi terkhilaf apabila mencapai keputusan yang dibuatnya dan mahkamah ini harus campur tangan. Oleh itu, mahkamah ini mengeluarkan writ *habeas corpus* dan perayu harus dibebaskan serta merta.

E **Case(s) referred to:**

Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***

Hiralal Ratan Lal v. The Sales Tax Officer, Section III, Kanpur AIR 1973 SC 1034 ***(refd)***

Jayaganesan Ramakrishnan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 9 CLJ 725 FC ***(refd)***

F *Kamleshwar Ishwar Prased Patel v. Union of India and Others [1985] 2 SCC 54* ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia [1969] 2 MLJ 129 ***(refd)***

Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC ***(refd)***

Kumaran Suppiah v. Dato' Noh Hj Omar & Anor [2006] 4 CLJ 675 FC ***(refd)***

L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors
G *[2010] 7 CLJ 653 FC* ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Anor [1993] 4 CLJ 211 SC ***(refd)***

Lui Ah Yong v. Superintendent of Prisons, Penang [1975] 1 LNS 91 HC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002]
H *1 CLJ 645 FC* ***(refd)***

Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 8 CLJ 465 FC ***(refd)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***

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Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 FC ***(refd)***
Munusamy v. Subramaniam & Ors [1969] 1 LNS 112 HC ***(refd)***
Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 4 CLJ 47 SC ***(refd)***
PP v. Mohd Fazil Awaludin [2009] 2 CLJ 862 HC ***(refd)***
R v. Secretary of State for Home Department, ex parte Doody [1994] IAC 531 ***(refd)***
R v. Secretary of State for Trade and Industry, ex parte Lonrho [1989] 1 WLR 525 ***(refd)***
Ratan Singh v. State of Punjab and Others [1981] 4 SCC 1981 ***(refd)***
Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 1 LNS 129 FC ***(refd)***
Re Onkar Shrian [1969] 1 LNS 155 HC ***(refd)***
SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***
Tan Seng Kuan lwn. Timbalan Menteri Dalam Negeri Malaysia & Satu Lagi [2019] 1 LNS 420 HC ***(refd)***
Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 9 CLJ 177 FC ***(refd)***
Yap Ser Yong lwn. Timbalan Menteri Dalam Negeri, Malaysia & 2 Lagi [2018] MLJU 235 ***(refd)***
Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia [1975] 2 MLJ 279 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2), Schedule para 1
Criminal Procedure Code, ss. 23, 28, 113(1), (3), 365
Dangerous Drugs Act 1952, s. 2
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), (2)(c), (3), 4(1), (5), 5(2), (3), (4), 6(1), 6A(1)(a)(i), (ii), 9(1), (2), 10(1), 11C, 11D, 14, 22(2)(d)
Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, r. 3(1), (3), (6)
Federal Constitution, art. 5(2)
Interpretation Acts 1948 and 1967, s. 54(2)

Other source(s) referred to:
Short & Mellor's Practice on the Crown Side of the King's Bench Division, 2nd edn, p 309
William Blackstone's Commentaries on the Law of England, 1765, 1st edn, vol 3, p 131

For the appellant - Goh Kim Lian; M/s Norma Goh & Co
For the respondents - Muhammad Sinti; SFC

[Editor's note: For the High Court judgment, please see Chua Kian Voon lwn. Menteri Dalam Negeri, Malaysia & Yang Lain [2019] 1 LNS 1254 (overruled).]

Reported by Suhainah Wahiduddin

A

JUDGMENT

Mohd Zawawi Salleh FCJ:

Introduction

[1] This appeal emanated from the decision of the learned High Court
B Judge given on 20 July 2018. The learned judge had dismissed the appellant's application for a writ of *habeas corpus*.

[2] The learned judge was satisfied that the detention order issued by the Deputy Minister of Home Affairs against the appellant was lawfully made. The learned judge further held that all the issues raised by the appellant were
C not issues of non-compliance as enunciated by the Federal Court in the case of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613.

[3] We heard the appeal on 4 September 2019 and unanimously allowed
D it. We now set out our detailed grounds for our decisions.

The Factual Background And Antecedent Proceedings

[4] The factual background and antecedent proceedings may be summarised as follows:

E (i) The appellant was arrested under s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ("1985 Act") on 21 September 2017, at about 2.30pm, at Jalan Donggongon Kasigui, Penampang, Sabah. On 1 October 2017, the investigating officer, Inspector Mohamad Faizal bin Mahzir, assisted by D/Corporal Mei Ling @
F Mei Liang who acted as an interpreter, recorded statement from the appellant at the Narcotics Crime Investigation Department, IPD Penampang, Sabah.

(ii) Upon being satisfied that there was sufficient evidence to show that the appellant was involved in drug trafficking activities, a copy of the
G complete report of the investigation was submitted to the Deputy Minister of Home Affairs and the inquiry officer of the Ministry.

(iii) On 29 September 2017, Deputy Commissioner of Police Dato' Kamarul Zaman bin Mamat, being an officer designated by the Inspector General of Police under s. 3(2)(c) of the 1985 Act, received
H a report on the circumstances surrounding the arrest and detention of the appellant ("the report") from Deputy Superintendent of Police Rosley bin Hobden, the Head of Crime Prevention and Community Safety Department IPD Miri, Sarawak. On 2 October 2017, Dato' Kamarul Zaman authorised further detention of the appellant beyond
I 14 days in accordance with the requirements of s. 3(2)(c) of the 1985 Act. The Deputy Minister received the report on 19 October 2017.

(iv) On 25 October 2017, the inquiry officer, Nadia binti Mohd Izhar ("inquiry officer"), received an investigation report made under s. 3(3) of the 1985 Act from Inspector Mohamad Faizal bin Mahzir. The report, among others, contained written statements recorded from certain witnesses and the appellant. On 14 November 2017, the inquiry officer conducted a physical examination on the appellant under s. 5(2) of the 1985 Act at the Operations Room, Narcotics Department, IPK Sabah.

(v) On 15 November 2017, the inquiry officer submitted a report to the Deputy Minister pursuant to s. 5(4) of the 1985 Act after having been satisfied that there were reasonable grounds to believe that the appellant had been or was associated with activities relating to or involving the trafficking in dangerous drugs ie, methamphetamine as defined under s. 2 of the Dangerous Drugs Act 1952.

(vi) After considering the police investigation report and the inquiry report submitted under ss. 3(3) and 5(4) of the 1985 Act, the Deputy Minister issued a detention order on 17 November 2017 under s. 6(1) of the 1985 Act, directing the appellant to be detained for a period of two years at the Pusat Pemulihan Akhlak Simpang Renggam, Johor ("the Centre") with immediate effect. The detention order, the grounds of the detention order and the statement of facts upon which the order was made were prepared by Arbi bin Suhadat, Assistant Secretary at the Security and Public Order Division, Ministry of Home Affairs under the instruction of the Deputy Minister. On the date the detention order was issued, the original copy of the detention order, the grounds of the detention order and the statement of facts upon which the order was made and three copies of Form I (representations in connection with the detention order) as provided under r. 3(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ("1987 Rules") were served on and was said to have been explained to the appellant by Inspector Mohamad Faizal through a Mandarin interpreter, Constable Tong Wilson, at Central Lock-up, Sabah at 7.15pm.

(vii) Through Constable Tong Wilson, Inspector Mohamad Faizal said that he had also explained to the appellant, of his rights to make representation, to be represented by a counsel of his choice and to call witnesses before the Advisory Board ("Board"). On 23 November 2017, the appellant was brought to the Centre at 6pm.

(viii) The Board after considering the representation of the appellant, had on 15 February 2018, forwarded its recommendation to Yang di-Pertuan Agong pursuant to s. 10(1) of the 1985 Act. On 9 March 2018, after considering the recommendations of the Board, His Majesty affirmed the detention order made by the Deputy Minister on 17 November 2017.

(ix) Dissatisfied, the appellant filed an application for a writ of *habeas corpus.* As we have alluded to earlier, the learned judge had dismissed the appellant's application. Hence, this appeal before us.

The Appeal

[5] Before us, the decision of the learned judge was assailed by the appellant on the following purported procedural non-compliances:

(i) Issue I – Non-compliance with s. 9(2) of the 1985 Act read together with r. 3(1) of the 1987 Rules;

(ii) Issue II – Non-compliance with r. 3(6) of the 1987 Rules;

(iii) Issue III – Non-compliance with s. 4(5) of the 1985 Act;

(iv) Issue IV – Non-compliance with s. 3(3) of the 1985 Act; and

(v) Issue V – Non-compliance with s. 5(2) of the 1985 Act.

The Law On *Habeas Corpus*

[6] To provide context to the instant appeal, perhaps it would be useful at the outset to discuss briefly the history, scope and significance of the writ of *habeas corpus*.

[7] The term *habeas corpus* refers most commonly to a specific writ known in full as "*habeas corpus ad subjiciendum*", a prerogative writ ordering that a prisoner be brought to the court so that it can be determined whether or not the prisoner is being imprisoned lawfully. Put simply, a writ of *habeas corpus* is a challenge to the legality of a prisoner's detention. The words "*habeas corpus*" is a Latin law term. Its literal English translation is: "you have the body".

[8] The writ of *habeas corpus*, described by Blackstone as the "great and efficacious writ, in all manner of illegal confinement" (see: *William Blackstone's Commentaries on the Law of England*, 1st edn., 1765, vol. 3 at p. 131), functions as a judicial remedy aimed at preventing the arbitrary use of Executive power to imprison individuals unlawfully. The use of *habeas corpus* has roots in English common law dating back to the fourteenth century. It was first expressed in the *Magna Carta* of 1215, which stated, "No

free man shall be seized, or imprisoned, or disseized, or outlawed, or exiled, or injured in any way, nor we will enter on him or send against him except by the lawful judgment of his peers, or by the law of the land".

[9] The *habeas corpus* remedy is recognised in the countries of the Anglo-American legal system but is generally not found in civil-law countries, although some of them have adopted comparable procedures.

[10] In Malaysia, the Federal Constitution makes no explicit provisions for the writ of *habeas corpus*. The legal basis for the writ of *habeas corpus* in Malaysia is art. 5(2) of the Constitution and ss. 23, 28, and 365 of the Criminal Procedure Code. In addition, there are statutory provisions in s. 25(2) of the Courts of Judicature Act 1964 (along with para. 1 of the Schedule) (see: *Munusamy v. Subramaniam & Ors* [1969] 1 LNS 112; [1969] 2 MLJ 108).

[11] The writ of *habeas corpus* is the fundamental instrument for safeguarding individuals against arbitrary and unlawful state action. In this connection, the observation made by Choor Singh J in *Re Onkar Shrian* [1969] 1 LNS 155; [1970] 1 MLJ 28 as embraced by this court in *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81, where the judgment of Choor Singh J in *Re Onkar* (*supra*) was quoted as below is particularly instructive:

> Where the personal freedom of an individual is wrongly interfered with by another, the release of the former from illegal detention may be effected by *habeas corpus.* The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus.*

[12] The learned judge in *Nasharuddin Nasir* (*supra*) also quoted with approval the following passage in *Short & Mellor's Practice on the Crown Side of the King's Bench Division*, 2nd edn. at p. 309:

> The primary object of the writ is for the purpose of bringing the body into court, and therefore, if that is impossible, the writ ought not to issue. It should not be used punitively but only remedially. In *R v. Barnado* [1892] AC 316, Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. In this the rest of the court agreed.

[13] The writ of *habeas corpus* is a powerful remedy in the sense that it is not discretionary. It is distinct from the prerogative writs such as those of *certiorari*, prohibition and *mandamus*. The writ of *habeas corpus* must be issued if the court finds that the detenu is illegally or improperly detained. In *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia* [1975] 2 MLJ 279, Abdoolcader J (as His Lordship then was) had this to say at p. 281:

> The grant of *habeas corpus* is as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as *certiorari*, prohibition and *mandamus*. It is a writ of right against which no privilege of person or place can be of any avail (*R v. Pell and Offly* 84 All ER 720). The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of *habeas corpus* and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State ex rel Evans v. Broaddus* 245 Mo 123 140 that at least in times of peace every human power must give way to the writ of *habeas corpus* and no prison door is stout enough to stand in its way.

[14] Where a detainee challenges his detention as being illegal, the burden lies on the detaining authority to show that the detention is legal. In *SK Takaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia* [2009] 6 CLJ 705, Gopal Sri Ram FCJ held as follows at p. 710:

> It is settled law that on an application for *habeas corpus* the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals* [1988] 1 LNS 162. In *Mohinuddin v. District Magistrate, Beed* AIR [1987] SC 1977, the Supreme Court of India observed as follows in the context of art. 221 of the Indian Constitution from which is drawn our art. 151:
>
> > It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5).

[15] After the party who made the detention succeeded in proving that the detention is in accordance with the law, the onus then shifts to the detainee, especially if he alleges bad faith (see: *Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129).

[16] A detainee is entitled to take advantage of any technical defect which has the effect of invalidating the detention (see: *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 4 CLJ 47). Even if the detention was originally made in the exercise of a legal power, the said detention order subsequently becomes invalid over a passage of time (see: *Lui Ah Yong v. Superintendent of Prisons, Penang* [1975] 1 LNS 91; [1977] 2 MLJ 226; *Jayaganesan Ramakrishnan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 9 CLJ 725; [2019] 5 AMR 509; *Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 9 CLJ 177).

[17] It must be borne in mind that the ambit of judicial review of the ministerial detention order issued under the 1985 Act is restricted and curtailed by ss. 11C and 11D which provide as follows:

> **Judicial review of act or decision of Yang di-Pertuan Agong and Minister**
>
> 11C (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 6A.
>
> **Interpretation of "judicial review"**
>
> 11D. In this Act, "judicial review" includes proceedings instituted by way of:
>
> (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;
>
> (b) an application for a declaration or an injunction;
>
> (c) a writ of *habeas corpus*; and
>
> (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act.

[18] It is apparent that the provisions of ss. 11C and 11D were inserted in the 1985 Act with the intention to oust the court's power to review all acts done or decision made in the exercise of the Minister's discretionary powers except on non-compliance with any procedural requirements (see: *Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 3 CLJ 914; *Mohd Faizal Haris* (*supra*).

[19] Generally speaking, non-compliance with mandatory requirements will render a detention illegal. In *Re Datuk James Wong Kim Min* [1976] 1 LNS 129; [1976] 2 MLJ 244 at p. 251, Lee Hun Hoe (CJ Borneo) stated:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, **strict compliance with statutory requirements must be observed in depriving a person of his liberty**. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provide for the protection of any citizen must be liberally interpreted. **Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith.** Where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184. (emphasis added).

[20] In *Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687, this court in deciding a case concerning a detention order issued under the 1985 Act, held:

> [8] … The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 3 CLJ 649 (Rep); [1991] 2 CLJ 1199; [1991] 3 MLJ 28; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 CLJ 373; [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. *A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice.* The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However, it must be observed that the power of the Court to intervene is limited to only matters of compliance with procedural requirements … (emphasis added)

[21] We now turn to consider the issues raised by the appellant in this instant appeal.

Issues (i) And (ii) – Representation To The Board (Non-compliance With s. 9(2) Of The 1985 Act And r. 3(1) And (6) Of 1987 Rules)

[22] We have considered issues (i) and (ii) together as they involved the same question of law and fact ie, matters concerning the service of detention order on the appellant for the purpose of making representation to the Board.

[23] To recapitulate, issue (i) concerned the failure on the part of Inspector Mohamad Faizal to inform the appellant of the latter's right to make representation before the Board, while issue (ii) concerned the failure on the part of the respondents to inform the Secretary of the Board of the service of the detention order.

Appellant's Submission

[24] The appellant contended that he was not properly briefed of his rights to make representation to the Board by Inspector Mohamad Faizal in the language or dialect that he is fluent in. Instead, it was alleged that he was directed to enquire about his rights during the detention from one of the detainees available at the material time by the name of Clement Tseu. According to the appellant, this was never rebutted in the affidavit-in-reply of Inspector Mohamad Faizal.

[25] The appellant further contended that, if there was explanation given by one Constable Tong Wilson in the language or dialect that he is fluent in, this should be reflected in the detention order.

[26] The appellant also argued that a statutory form (Form I) must be filled up and the failure to do so would tantamount to procedural non-compliance. According to the appellant, this was the reason he refused to fill up some columns in and sign Form I. Notwithstanding the incompleteness of Form I, the appellant contended that it was obligatory upon the respondents to inform the Secretary of the Advisory Board of the service of Form I. This part was, however, left blank by the respondents.

Respondents' Submission

[27] The respondents averred that the appellant had indeed been briefed of his rights in Mandarin by Constable Tong Wilson. However, Constable Tong Wilson admitted in his affidavit-in-reply that he had overlooked the language/dialect column in the detention order which had inadvertently left blank. According to him, the mistake was purely his and the appellant had not been prejudiced by such omission, because he had in fact briefed the appellant.

Our Decision On Issues (i) And (ii)

[28] The starting point is to set out the key statutory provisions relevant to the issues.

[29] Section 9(1) of the 1985 Act provides that a detainee is entitled to make representation to the Board; while s. 9(2) of the 1985 Act stipulates the procedure leading up to making representation by a detainee. It reads:

Representation against detention order

9(1) A copy of every order made by the Minister under subsection 6(1) shall as soon as may be after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations to an Advisory Board.

(2) For the purpose of enabling a person to make representations under subsection (1) he **shall, at the time of service on him of the order:**

(a) **be informed of his rights** to make representations to an Advisory Board under subsection (1); and

(b) … (emphasis added).

[30] Rules 3(1) and (6) of the 1987 Rules provide the procedural requirements for service of the detention order. Rule 3(1) reiterates the requirement provided in s. 9(2) above that service and explanation must take place concurrently. Rule 3(6) on the other hand provides the mechanism where a detainee refuses to accept service. Both rules are reproduced below:

Procedure for making representation.

3(1) When any person is served with a detention order, the police officer serving the detention order **shall at the same time**:

(a) **inform that person of his right to make representations** against the detention order; and

(b) **provide him with three copies of Form I** prescribed in the Schedule and obtain from him an acknowledgement of the receipt thereof.

…

(6) **A detained person who refuses to accept service of any document** at the time when he was served with the detention order may request the Officer in Charge to serve Form I on him, and the Officer in Charge **shall** on such request being made, serve three copies of Form I on the detained person and inform the Secretary of such service. (emphasis added).

[31] We have considered the appellant's allegation that he was referred to another detainee by the name of Clement Tseu for the purpose of explaining his right to make representations to the Board. The allegation was, however, not supported by any evidence on record. Jurisprudence dictates that mere allegation is not evidence and is not equivalent to proof. A party's self-serving affidavit that is not supported by evidence is not sufficient to establish an alleged fact.

[32] However, we recognised that there was some force in the appellant's argument that the failure on the part of Constable Tong Wilson to fill up the column in Form I was a non-compliance with the statutory requirement. The fact that the column for the language in which the interpretation given by

Constable Tong Wilson was left bank was not in dispute. The respondents did not file any affidavit to deny this fact. Exhibit MF-1 at p. 206 (vol. 3 of the appeal record) appended to the affidavit of Inspector Mohamed Faizal revealed that the column for the language in which the interpretation given by Constable Tong Wilson was indeed left blank.

[33] In our considered opinion, the provisions of s. 9(1) and r. 3(1) of the 1987 Rules required strict compliance and the failure on the part of Constable Tong Wilson to fill up the column was indeed fatal. When the form was blank we can only infer that the interpretation did not take place. This failure lend support to the allegation of the appellant. It has cast doubt as to whether the explanation did or did not take place. Consequently, we held that there was non-compliance with the statutory requirements as provided under those provisions.

Issue (ii)

[34] As regards issue (ii), we were of the considered view that it was incumbent upon the respondents to convey to the Secretary of the Board of the service of three copies of Form I to the appellant. The language of r. 3(6) of the 1987 Rules is lucidly expressed.

[35] It is important to emphasise that the present appeal relates to the appellant's complaint of the failure of the respondent to inform the Secretary of the Board of the service of Form I. It is clear from the affidavit of the appellant that he refused to accept any documents, including Form I, as the appellant was not satisfied with the explanation given by Inspector Mohamad Faizal when serving the detention order on him. This can be seen in the appellant's affidavit at paras. 5 to 7 which state as follows:

> … sesungguhnya Insp. Mohamad Faizal bin Mahzir telah memberitahu saya bahawa tujuan representasi dijalankan adalah untuk membuat bantahan terhadap Perintah Tahanan sahaja. **Oleh itu, saya enggan menerima apa-apa dokumen yang hendak disampaikan kepada saya.**
>
> … **saya enggan menerima Borang I ini dan dokumen-dokumen lain** yang hendak disampaikan saya oleh pihak Responden dan dengan ini, saya enggan mengisikan ruangan-ruangan sepertimana yang dinyatakan oleh Insp. Mohamad Faizal bin Mahzir di perenggan 22 afidavit jawapannya.
>
> … saya sesungguhnya enggan untuk menandatangani ruangan tandatangan oleh sebab saya enggan menerima apa-apa dokumen yang hendak disampaikan kepada saya dengan perintah tahanan itu. (emphasis added).

[36] In our considered opinion, the receipt of Form I by the appellant is not a pre-condition for the respondent to convey to the Board of the service of Form I to the appellant. Rule 3(6) of the 1987 Rules merely stipulates for a situation where an appellant refuses to accept any document at the time when he is served with a detention order. It does not absolve Inspector Mohamad Faizal bin Mahzir from informing the Secretary of the Board of the service of three copies of Form I to the appellant.

[37] In light of the foregoing reasons, we held that the respondent had failed to comply with the requirements of s. 9(2) of the 1985 Act and r. 3(6) of the 1987 Rules.

Issue (iii) – Investigation Stage: Recorded Statement Bears No Date (Non-compliance With s. 4(5) Of The 1985 Act)

Appellant's Submission

[38] The appellant contended that the statement recorded during the investigation was never supplied to him. The appellant referred us to the affidavit-in-reply of Inspector Mohamad Faizal and contended that only the date and not the time was mentioned in the affidavit. Also, the time when the investigation took place cannot be verified in the affidavit-in-reply of Corporal Mei Ling. Hence, the appellant posited that this was a clear contravention of s. 4(1) and (5) of the 1985 Act.

[39] In support of his submission, the appellant relied on the decision of this court which affirmed the High Court's decision in the case of *Chong Chuan Sze v. Timbalan Menteri Dalam Negeri & Ors* (Criminal Appeal No. 05-60-2010(C)). At the High Court, it was found that the respondents in that case had contravened s. 4(5) of the 1985 Act in which the police had failed to provide an interpreter during the course of investigation. It was further held that there was non-compliance with the said section and consequently the High Court granted the writ of *habeas corpus* to the appellant.

[40] The appellant also referred us to the case of *Tan Seng Kuan v. Timbalan Menteri Dalam Negeri Malaysia & Satu Lagi* [2019] 1 LNS 420, where it was held by the High Court that the respondents in that case had contravened s. 4(5) of the 1985 Act by failing to furnish the statement made during investigation to the appellant in that case.

Respondents' Submission

[41] In reply, the respondents averred that it was not a requirement under the law for them to furnish the appellant with the recorded statement. In support of his submission, the respondents had placed reliance on the decision of the High Court in the case of *Yap Ser Yong v. Timbalan Menteri Dalam Negeri, Malaysia & 2 Lagi* [2018] MLJU 235. The respondents

contended that the impugned statement was protected under s. 14 of the 1985 Act and, therefore, the refusal to furnish was justifiable. The respondents also relied upon two other decisions of this court, which had affirmed the decisions of the High Court in the cases of *Menteri Dalam Negeri & 2 Lagi v Nagarajan a/l Balakrishnan* (Rayuan Jenayah No. 05-221-09-2017(B)) and *Muhammad Nawawi Tee Abdullah v. Timbalan Menteri Dalam Negeri, Malaysia & 2 Lagi* (Rayuan Jenayah No: 05(HC)-2-01-2019(B)). The respondents further argued that the appellant had never requested to be supplied with his recorded statement for the purpose of making representation.

[42] On the issue of the failure to state the time of investigation, the respondents supported the finding of the High Court that the appellant had failed to append to the latter's affidavit the impugned recorded statement as an exhibit to fortify his argument. Hence, the High Court opined that this issue was devoid of any merit. The respondents relied on the decision of this court in *L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 7 CLJ 653 and cited the following passage of the case: "the manner on conducting the investigations and arrests at this stage, is neither a condition precedent nor a matter which has a direct link with the detention order and thus not a ground for judicial review".

[43] Now, s. 4(1) and (5) of the 1985 Act is in the following terms:

> **Examination of persons acquainted with the facts and circumstances of case.**
>
> 4(1) For the purpose of satisfying the Minister that an order under subsection 6(1) should be made and for the purpose of enabling the Minister to furnish a statement under paragraph 9(2)(b), a police officer making an investigation under this Act may direct any police officer not below the rank of Sergeant to examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.
>
> …
>
> (5) A statement made by any person under subsection (1) **shall bear the date and time** of making thereof and shall be signed by the person making it or affixed with his thumbprint, as the case may be, after it has been read to him in the language in which it was made and after he has been given an opportunity to make any corrections he may wish. (emphasis added).

[44] We do not propose to embark on a general review of the cases cited. Suffice to say that the issues involved in those cases were entirely different from the present case.

[45] In our considered opinion, the provisions of s. 4(1) and (5) of 1985 Act are very clear. It is trite that where the words are clear and unambiguous, a court should give effect to the plain words. In *Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385, citing the decision of the Supreme Court of India in the case of *Hiralal Ratan Lal v. The Sales Tax Officer, Section III, Kanpur* AIR 1973 SC 1034, this court observed:

> *In construing a statutory provision, the first and foremost rule of construction is the literary construction.* All that we have to see at the very outset is what does that provision say? *If the provision is unambiguous and if from that provision the legislative intent is clear, we need not call into aid the other rules of construction of statutes.* (emphasis added).

[46] In *Lock Wee Kock v. Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 4 CLJ 211; [1993] 3 MLJ 691, the facts were very similar to the present case where the appellant was arrested and detained by the police under s. 3(1) of the 1985 Act. In determining whether a provision is mandatory or otherwise, the Supreme Court had this to say:

> The use of the word 'may' and 'shall' has led to some confusion in the interpretation of provision of a statute. In ordinary usage, the word 'may' is permissive and the word 'shall' is imperative. The courts have always construed these words with reference to the context in which it is used. *In order to find out whether these words are being used in a directory or mandatory sense, the intent of the legislature should be looked into, along with the pertinent circumstance.* If it appears to be the settled intention of the legislature to convey the sense of compulsion, then whether the word 'may' or 'shall' is used, it has mandatory effect. Perhaps the task or the court in interpreting these words would be solved if the Interpretation Acts 1948 and 1967 (consolidated and revised 1989) were to contain such provisions as that found in s. 37 of the Barbados Interpretation Act:
>
> - Laws of Barbados Cap 1 which states –
>
> In an enactment passed or made after 16 June 1996, the expression 'shall' shall be construed as imperative and the expression 'may' as permissive and empowering. (emphasis added).

[47] The issue of whether a provision is mandatory or directory is question of law. We recognise that the use of the word "shall", although significant, does not invariably create a mandatory duty. However, the general rule is that when the Legislature uses the word "shall", it suggests, although not conclusive, that the provisions are intended to be mandatory.

[48] It can clearly be seen that the phrase "date and time" in s. 4(5) of the 1985 Act is preceded by the word "shall" and the word "date" is immediately followed by the word "and". Therefore, the words "date and time" must be read conjunctively. In our considered opinion, no part of a legislative enactment is to be treated as insignificant or unnecessary, and there is a presumption of the purpose behind every sentence, clause or phrase and no word in a statute is to be treated as superfluous.

[49] For the stated reasons, we, therefore concluded that the statutory requirement under s. 4(5) of the 1985 Act to state the date and time was mandatory. Failure to comply with the said section by not stating the time would render the detention unlawful.

[50] Further to our above conclusion, we found no merit in the respondents' contention that there is no legal requirement on them to provide the appellant with his recorded statement. We were equally perplexed by the conclusion of the court below that the appellant was unable to fortify his argument by failing to append a copy of his recorded statement to prove that the time was not stated. The perplexity becomes apparent if we ask the question: how is someone to append proof that a document is defective if, in the first place, he is not supplied with it?

[51] There is nothing in the 1985 Act (apart from s. 14), expressly enabling the respondents the right to withhold the recorded statement from the appellant. For clarity, we analogously referred to s. 113 of the Criminal Procedure Code. Section 113(1) expressly stipulates that no statement made by any person to a police officer in the course of a police investigation made under the relevant chapter of the Code shall be used in evidence. That is the general rule. The rest of the said s. 113 stipulates situations when such a recorded statement may be admissible. Most notably, s. 113(3) expressly requires that where the accused had made a statement during the course of a police investigation, such statement may be admitted in evidence in support of his defence during the course of the trial.

[52] The concept of fair trial necessitates the observance of the "equality of arms" principle that each party must be afforded a reasonable opportunity to present his or her case and that such person not be placed at a disadvantage *vis-à-vis* his opponent. In support of that proposition, we refer to the decision of the High Court in *PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862; [2009] 8 MLJ 579, at para. [12] which decision was subsequently cited with approval by this court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312. While the said cases related generally to ordinary criminal proceedings, we see no reason why the same principle ought not to apply with equal force to *habeas corpus* proceedings. We held a similar view

in our most recent judgment on this subject in *Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 8 CLJ 465, at para. [18], that laws which deprive a subject of his right to personal liberty ought to be accorded the same strict construction as penal laws.

[53] Now, on s. 14 of the 1985 Act, we were of the view that the respondents' reliance on that provision was, with respect, unsustainable on the facts of the present case. The said section reads:

> 14. Nothing in this Part or in any rules or regulations made thereunder shall require the Minister or any member of an Advisory Board or any Inquiry Officer or any public servant to disclose facts or to produce documents which he considers to be against the national interest to disclose or produce.

[54] It would appear that the section allows the inquiry officer the general right to withhold disclosure or production of any document including the appellant's recorded statement. The operative words of that section are found in the last two lines where the relevant persons need not disclose documents, "if they consider it against the national interest to disclose or produce".

[55] We had perused the evidence on record and found no reason was proffered by the inquiry officer, especially in her affidavit in reply dated 13 September 2018, why she thought it would be against national interest to disclose or produce to the appellant his recorded statement.

[56] In this instant appeal, the appellant's personal liberty was at stake. The appellant was detained under 1985 Act without trial where some of the important legal safeguards such as the presumption of innocence until proven guilty according to law in a public trial and the burden on the prosecution to prove every element of an offence beyond reasonable doubt were denied to the appellant. Therefore, it is incumbent upon the respondents to give reason for the failure to produce to the appellant his recorded statement.

[57] In *R v. Secretary of State for Home Department, ex parte Doody* [1994] 1 AC 531, the House of Lords held that the classes of case where there is a duty to give reasons include:

(i) where the subject matter is an interest so highly regarded by the law (eg personal liberty) that fairness requires that reasons, at least for particular decisions, be given as of right; and

(ii) where the decision appears aberrant, fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real or apparent.

[58] Further, if there is no explanation given, the court will assume that there is no reason. In *R v. Secretary of State for Trade and Industry, ex parte Lonrho* [1989] 1 WLR 525, the House of Lords held that the absence of reasons for a decision where there was no statutory duty to provide reason cannot by itself provide any support "for the suggested irrationality of the decision" (at pp. 539-540), but the significance of the absence of reason is that if:

> … all other known facts and circumstances appear to point over whelmingly in favour of a different decision, the decision maker who has given no reasons, cannot complain if the court draws the inference that he had no reason for his decision. (at 540).

[59] Therefore, the respondents would necessarily need to provide credible reasons as to why they saw it necessary to involve s. 14 of the 1985 Act. Here, there was no such reason given.

[60] This was the other reason supporting our conclusion that appellant's detention was unlawful.

Issue (v) – Inquiry Stage: Delay In Conducting Inquiry (Non-compliance With s. 5(2) Of The 1985 Act)

Appellant's Submission

[61] The appellant submitted that there was inordinate delay in holding the inquiry. As the facts have it, the inquiry was held 21 days after the inquiry officer Nadia binti Mohd Izhar received the investigation report from Inspector Mohamad Faizal. The appellant contended that this had prejudiced him. It was further contended that the explanation given by the inquiry officer was unsatisfactory and purely administrative. It was argued that the appellant's rights to liberty and security were violated due to the length of delay in holding the inquiry.

Respondents' Submission

[62] In reply, the respondents submitted that from the affidavit of the inquiry officer Nadia binti Mohd Izhar (at pp. 81-88, vol 2, appeal record), it could be seen that the requirements under s. 5 had been complied with. The inquiry officer had ensured that the inquiry had been conducted in a language that the appellant understood *viz.* Bahasa Malaysia and that the appellant had given out his statement voluntarily without any coercion. Therefore, there was no procedural non-compliance of s. 5 of the 1985 Act on the part of the respondents as alleged by the appellant.

A Our Decision On Issue (v)

[63] The relevant statutory provisions on this issue are as follows:

i. Section 5(2) of the 1985 Act

Inquiry Officer

B

5(2) **Upon receiving the report under subsection 3(3)**, the **Inquiry Officer shall inquire** whether there are reasonable grounds for believing that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs.

…

C

(4) An Inquiry Officer shall submit his report in writing to the Minister **within such period as may be prescribed by the Minister by regulations made under this Act.** (emphasis added).

[64] For clarity, the appeal before us did not concern the manner in which
D the inquiry was conducted as stipulated under s. 5(3), but rather on the time taken by the inquiry officer to conduct the inquiry against the appellant upon receiving the police investigation report on 25 October 2017, as stipulated under s. 5(2) of the 1985 Act.

[65] It is beyond argument that there is no provision in the 1985 Act that
E specifies the period within which the inquiry officer is required to conduct the inquiry. To the best of our knowledge, the Minister has yet to exercise his power under s. 22(2)(d) of the 1985 Act which allows him to "prescribe anything which may be prescribed under the Act" on this matter.

[66] The exercise of the Minister's discretionary power in prescribing the
F time period had been decided by the Supreme Court in *Lock Wee Kock* (*supra*) where the court held:

> It will be seen that Parliament has fixed the time periods under s. 3(2) of the Act, but leaves it entirely to the Minister to fix the period within which the report is to be submitted under ss. 3(3) and 5(4) of the Act. We are
G quite appreciative of the reasons why Parliament leaves it to the discretion of the Minister to fix the period. The Minister has to take into consideration the amount of work and time which is taken up by the police and the inquiry officer to complete their investigation and inquiry. A simple and straight forward case may take few days to complete, while a complicated one may take longer. If the Minister fixes a time period
H within which the police investigating officer is to submit his report under s. 3(3) or the inquiry officer under s. 5(4) of the Act, that period may not be sufficient where the case will involve a lengthy investigation or inquiry and this may result in the reports not being complete in the sense that matters which ought to be investigated or inquired into are left out. This will impose difficulty on the Minister to act under s. 6(1) of the Act, when
I deciding to make or not to make the detention order.

> The time may come when the Minister, through his experience in dealing with this matter, can positively assess what should be the time period within which the police investigating officer or the inquiry officer can certainly complete his report and, until the Minister can come to that conclusion, he should not fix the time by exercising his powers under ss. 3(3) and 5(4) of the Act. We are of the view that for the reasons given, the words 'as may be prescribed by the Minister' found in both sections ought to be treated as conferring a power to prescribe, exercisable at his discretion, and not mandatory. The fact that no period has been prescribed by the Minister within which the reports are to be submitted by the investigating officer under s. 3(3) or by the inquiry officer under s. 5(4) of the Act does not vitiate the process leading to the detention order being made by the Minister.

[67] Section 5(4) of the 1985 Act allows the Minister to prescribe regulations stipulating time but as apparent from the above, the Minister has not done so. We then turned to s. 54(2) of the Interpretation Acts 1948 and 1967 which stipulates that where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion requires. Simply put, for any matter where time has not by law been prescribed, such matter ought to be completed as soon as practicable and without inordinate delay.

[68] As the burden to prove the detention was lawful lies on the detaining authority, whether the report was completed with convenient speed or without inordinate delay remains a matter for the detaining authority ie, the respondents, to establish. It is trite that where there is delay on the part of the respondents to complete the report with "convenient speed", it is incumbent upon the respondents to discharge the burden of proffering a satisfactory explanation for the delay. Thus, as we have alluded to earlier, if there is no explanation given, the court will assume that there are no reasons.

[69] We accordingly examined the evidence on record particularly the affidavits deposed by the inquiry officer, Nadia binti Mohd Izhar. We found none of her affidavits nor do any other affidavits from the respondents provide any credible reasons for the 21-day delay. The only reasons she gave in paras. 7 and 8 of her affidavit in reply dated 13 September 2018 were that she could only conduct physical examination on the appellant because she needed to read the file, examine the documents and the other subjects (witnesses). These, with respect, hardly constitute reasons because they are procedural matters which every other inquiry officer in her place would have to perform. The court cannot simply accede to the inquiry officer's plea of heavy workload as basis for the delay to conduct inquiry against the appellant under s. 5(2) of the 1985 Act. If this plea were to be accepted, it would become a source of justification for prolonged and unacceptable delay in conducting the inquiry and this would impair the interest of the appellant.

[70] For the reasons aforementioned and in the absence of credible reasons for the delay, we had no option but to conclude that the 21-day delay in the time taken for the inquiry officer to conduct her inquiry against the appellant was inordinate and not with "convenient speed". This, to us was another reason rendering the detention unlawful.

Issue (iv) – Representation: Delay In Reminding Rights (Non-compliance With r. 3(3) Of The 1987 Rules)

Appellant's Submission

[71] At the outset, it must be noted that this matter had not been dealt with by the learned High Court Judge in his grounds of judgment dated 30 June 2019.

[72] Be that as it may, the appellant challenged his detention under s. 6A(1)(a)(i) of the 1985 Act on the ground that there was non-compliance with r. 3(3) of the 1987 Rules which requires the officer-in-charge of the Centre to remind a detainee of his rights to make representations against his detention to the Board. The challenge on this issue was mounted on the ground that the reminder was given three days after he was detained at the Centre.

[73] The appellant contended that the three-day gap was not satisfactorily explained and the officer-in-charge of the Centre can only come to the Centre on 26 November 2017 to explain to him of the rights after the weekend had lapsed. The appellant referred to s. 54(2) of the Interpretation Acts 1948 and 1967 and the Federal Court orders in the case of *Khor Kok Kheng v. Timbalan Menteri Dalam Negeri, Malaysia* (Criminal Appeal No: 05-268-11-2017) and the case of *Kumaran Suppiah v. Dato' Noh Hj Omar & Anor* [2006] 4 CLJ 675 to support his submission.

Respondents' Submission

[74] The respondents submitted that the delay in bringing the appellant to the Centre from Sabah Contingent Central Prison in Kota Kinabalu was due to administrative and logistic reasons.

[75] The respondents relied upon ss. 6A(1)(a)(i) & (ii) of the 1985 Act and the case of *Jason Wong Teck Siong v. Timbalan Menteri Dalam Negeri dan 2 Lagi* (Criminal Appeal No: 05(HC)-130-05-2018(W)) in support of their submission.

[76] The respondents also referred us to the affidavit of Ramli Hussain, the officer-in-charge of the Centre and averred that the appellant was brought into the Centre late in the evening of 23 November 2017. Further, 24 & 25 November 2017 were weekend public holidays in the State of Johor. It

was contended that there was no non-compliance of s. 9(1) of the 1985 Act as the appellant had been briefed of his rights when the detention order was served on him on 17 November 2017 before he was sent to the Centre.

Our Decision On Issue (iv)

[77] Rule 3(3) of the 1987 Rules provides:

> **Procedure for making representation.**
>
> 3.(3) When a detained person is brought to a place of detention, **the Officer in Charge shall as soon as practicable remind the person of his right to make representations.** (emphasis added).

[78] We were of the considered view that there was no inordinate delay on the part of the officer-in-charge in explaining the appellant's right to make representation against his detention order to the Board. His explanation was reasonable, given the timing in which the appellant was brought in to the Centre was on a Thursday (23 November 2017). We took judicial notice that Fridays and Saturdays were the designated weekend public holidays in the State of Johor. Upon returning to work on Sunday (26 November 2017), he acted as required by r. 3(3) of the 1987 Rules and explained to the appellant of his rights to make representation before the Board. In the circumstances of the case, the conduct of the officer-in-charge of the Centre was reasonable and practical.

[79] Considering the evidence in entirety, we were not persuaded that the officer-in-charge of the Centre had failed to comply with the requirement of r. 3(3) of the 1987 Rules.

[80] Before departing from the present appeal, we would like to emphasise that under the provision of 1985 Act, non-compliance with any procedural requirements are the only safeguard available to detenu since the court is not allowed to go beyond the subjective satisfaction of the Minister. Therefore, the procedure requirements must be strictly and faithfully complied with.

[81] In *Kamleshwar Ishwar Prased Patel v. Union of India and Others* [1985] 2 SCC 54, the Supreme Court of India observed at para. 49:

> The history of liberty is the history of procedural safeguards. These procedural safeguards are required to be zealously watched and enforced by the Court and their rigour cannot be allowed to be diluted on the basis of alleged activities of the detenu.

[82] The Supreme Court of India also quoted with approval the following observation made in *Ratan Singh v. State of Punjab and Others* [1981] 4 SCC 1981:

A But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus.

Conclusion

B **[83]** For the foregoing reasons, we were of the view that the learned High Court Judge had erred in arriving at the decision that he did and it behoved this court to intervene. Consequently, the learned judge's decision in this instant appeal must be set aside and we allowed the appeal and issued the writ of *habeas corpus* and the appellant should be released forthwith.

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